Dato' Seri Timor Shah Rafiq v Nautilus Tug & Towage Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24NCC-151–03 OF 2018
DARRYL GOON J
11 JUNE 2019

Arbitration — Confidentiality — Documents — Confidentiality in arbitration — Whether it extended to third parties — Arbitration Act 2005 s 41A

Companies and Corporations — Derivative action — Application for — Application for leave to initiate derivative action on behalf of defendant — Whether plaintiff qualified as complainant — Whether there existed good cause of action — Whether there was any prospect of success — Whether plaintiff was acting in good faith — Whether it appeared prima facie to be in the best interest of company that leave be granted — Companies Act 2016 ss 347 & 348

This was an application by the plaintiff under s 348 of the Companies Act 2016 ('the Act') for leave to initiate proceedings on behalf of the defendant company pursuant to s 347 of the Act. The plaintiff was a director of the defendant while the defendant was a local private limited company in the business of owning, leasing, chartering and hiring boats, ships and other vessels. The defendant was said to be a joint venture between two companies being Azimuth Marine Sdn Bhd ('Azimuth Marine') and Nautical Supreme Sdn Bhd ('Nautical Supreme'). The shareholders of the defendant were Azimuth Marine, Nautical Supreme and an individual known as Jaya Suria. The defendant entered into a Habour Tugs Services Agreement ('HTSA') with a company known as Vale Malaysia Minerals Sdn Bhd ('Vale') for the charter of seven harbour tugboats owned by the defendant. To carry out this HTSA, the defendant entered into a Baltic and International Maritime Council (BIMCO) Standard Ship Management Agreement with a company called Azimuth Ship Management Sdn Bhd ('Azimuth Ship Management'). One of the harbour tugboats chartered to Vale sank with its hull resting on the seabed, the defendant did not bring any action against Azimuth Ship Management for the incident, hence this application by the plaintiff to initiate proceedings against Azimuth Ship Management in the name of the defendant for negligence. The defendant raised a preliminary objection to the use of two documents and wanted to have them expunged and excluded from consideration on the basis that the documents were prepared for the purposes of arbitration and no consent was given by the defendant, who was a party to the arbitration, for the publication, disclosure or communication of either document. The plaintiff's case was that in a board meeting, discussing the incident where one of the tugboats sank, the plaintiff proposed that an

independent inquiry be taken as Captain Suresh and Azimuth Marine were conflicted and therefore unable to assess and investigate the incident in the best interest of the defendant. There was no resolution by the board adopting the plaintiff's proposal and the plaintiff informed the board that he was considering a 'section 181 action' against the defendant and its directors for not wanting to initiate an independent inquiry. Subsequently, Vale had provided an incident report, and based on the interview conducted with the crew of NTT Lumut as attached with the said report, the plaintiff maintained that it was clear the crew of the sunk ship had not been given any training, manuals or briefed on any Standard Operating Procedures in an emergency. In a subsequent board meeting, the minority directors reiterated the need for an independent investigation and the board resolved to revisit the issue pending the investigation by the Marine Department and the insurers. In a board meeting, the Board was informed by Captain Suresh that the Marine Department had concluded its investigations and a document of compliance was issued which indicated that there was no negligence, the board resolved not to conduct an independent investigation. The plaintiff then decided to engage an expert, Mr Alan Loynd ('Loynd') to provide an opinion on the incident which concluded that the incident could and should have been prevented. The defendant on the other hand relied on an independent report prepared by M3 Marine Expertise Pte Ltd ('M3 Marine'). The plaintiff then forwarded several questions posed by the expert to the board and requested that the expert be given unrestricted access to inspect the wreckage which was to be done at the defendant's cost. The defendant eventually refused to accede to this request and the plaintiff issued the statutory notice under s 348 of the Act. Subsequent to the issuance of the statutory notice, the board resolved to appoint one of two surveyors to conduct an independent investigation and mandated the Chairman to appoint surveyors to conduct an investigation. The plaintiff and another director voted against the proposal and proposed two independent experts be appointed to investigate the incident, one appointed by the majority directors and another appointed by the minority directors, however the board resolved against this proposal.

Held, dismissing the application with costs:

(1) The prohibition under s 41A(1) of the Arbitration Act 2005 did not extend to non-parties to an arbitration. This statutory prohibition superseded the common law principles of confidentiality attached to any arbitration. The common law principle was founded on an implied, if not otherwise expressed, obligation between parties to an arbitration, it could not be said to extend to non-parties. The confidentiality imposed would not apply where the interest of justice required disclosure (see paras 40–42).

(2) Being a director of the defendant, the plaintiff qualified as a 'complainant' for the purposes of s 347 of the Act, as defined under

A s 345(c) of the Act. Accordingly, the plaintiff had the requisite locus standi to invoke s 347 of the Act and to apply for leave under s 348 of the Act (see para 107).

(3) The statutory notice was required to show the complainant's intention to
B apply for the leave of court under s 347 of the Act which was wide enough to encompass leave to commence proceedings against third parties (see paras 111–112).

(4) In deciding whether or not leave ought to be granted, the court was
C required to take into account the following: (a) whether the plaintiff was acting in good faith; and (b) whether it appeared prima facie to be in the best interest of the company that leave be granted (see para 113).

(5) If no reasonable cause of action and one that had a reasonable prospect of success, could be demonstrated or if there was a collateral purpose for
D wanting to initiate proceedings, such would be incompatible with the required good faith in seeking to initiate proceedings in the name and on behalf of the company (see para 121).

(6) No answers were given to the questions Loynd posed, as such, Loynd's
E opinion was not final. Further, all the other reports did not suggest that there was any negligence on the part Azimuth Ship Management. In light of the above, it was difficult to conclude that the plaintiff had demonstrated that there existed a good cause of action in negligence against Azimuth Ship Management and one with a reasonable prospect
F of success (see paras 129, 131–132 & 137).

(7) An individual making an application under s 348 with an underlying purpose of furthering a dispute or to create controversy or to disrupt an opposing party's management of the company would be regarded as
G pursuing a collateral purpose not compatible with the interest of the company which would be contrary to the good faith required to be taken into account under s 348(4)(a) of the Act (see para 144).

(8) Set against the backdrop of the obvious dispute between the minority directors and majority directors, the fact that hitherto there existed no
H evidence of negligence on the part of Azimuth Ship Management coupled with the legal arguments that remained as possible impediments to any claim against Azimuth Ship Management in negligence, it was difficult to conclude that the plaintiff's insistence in commencing legal action against Azimuth Ship Management was in good faith and in the
I honest belief that it was in the interest of the defendant, rather than in furtherance of the dispute between the parties. In the circumstances, the required good faith on the part of the plaintiff was not established (see paras 146–147).

(9) It would not be in the best interest of the defendant for an action to be initiated on its behalf that was not supported by any evidence or concluded opinion that there existed a reasonable cause of action and one that had a reasonable prospect of success. This was so even on the basis of the requirement being only prima facie in the best interest of the defendant (see para 151).

[Bahasa Malaysia summary

Ini merupakan permohonan plaintif di bawah s 348 Akta Syarikat 2016 ('Akta tersebut') untuk izin untuk memulakan prosiding bagi pihak syarikat defendan selaras dengan s 347 Akta tersebut. Plaintif merupakan pengarah defendan manakala defendan merupakan syarikat sendirian berhad tempatan dalam perniagaan memiliki, memberi pajak, memberi carter, dan memberi sewa bot, kapal dan kapal lain. Defendan dikatakan merupakan satu usaha sama antara dua syarikat iaitu Azimuth Marine Sdn Bhd ('Azimuth Marine') dan Nautical Supreme Sdn Bhd ('Nautical Supreme'). Pemegang saham defendan adalah Azimuth Marine, Nautical Supreme dan seorang individu yang dikenali sebagai Jaya Suria. Defendan telah memasukki satu perjanjian Perkhidmatan Kapal Tunda Pelabuhan ('HTSA') dengan satu syarikat yang dikenali sebagai Vale Malaysia Minerals Sdn Bhd ('Vale') untuk carter tujuh kapal tunda pelabuhan yang dimiliki oleh defendan. Untuk menjalankan HTSA ini, defendan telah memasuki satu Baltic and International Maritime Council (BIMCO) Standarad Ship Management Agreement dengan satu starikat yang dikenali sebagai Azimuth Ship Management Sdn Bhd ('Azimuth Ship Management'). Salah satu daripada kapal tunda pelabuhan yang di carter oleh Vale tenggelam dengan badan kapalnya di dasar laut, defendan tidak membawa apa-apa tindakan terhadap Azimuth Ship Management atas insiden ini, oleh itu permohonan ini oleh plaintif untuk memulakan prosiding terhadap Azimuth Ship Management atas nama defendan untuk kecuaian. Defendan telah menimbulkan satu bantahan awal untuk penggunaan dua dokumen dan hendak dipadamkan dan dikecualikan daripada pertimbangan atas alasan dokumen-dokumen tersebut disediakan untuk tujuan penimbangtaraan dan tiada izin diberikan oleh defendan, yang merupakan pihak kepada penimbangtaraan tersebut, untuk penerbitan, pendedahan atau penyampaian kedua-dua dokumen. Kes plaintif adalah dalam satu mesyuarat lembaga, yang membincangkan kejadian yang mana satu kapal tunda tersebut tenggelam, plaintif mencadangkan satu inkuiri bebas di ambil kerana kapten Suresh dan Azimuth Marine mempunyai konflik kepentingan dan oleh itu, tidak mempunyai kebolehan untuk menyiasat dan membuat penentuan dalam kepentingan defendan. Tiada sebarang resolusi daripada lembaga yang bersetuju dengan cadangan plaintif dan plaintif memaklumkan kepada lembaga yang beliau sedang menimbangkan tindakan seksyen 181 terhadap defendan dan pengarahnya kerana enggan untuk memulakan inkuiri bebas. Kemudiannya, Vale telah menyediakan laporan insiden, dan berdasarkan temu ramah yang dikendalikan oleh anak kapal NTT Lumut sepertimana yang

dilampirkan dengan laporan tersebut, plaintif menyatakan bahawa ianya jelas bahawa anak kapal kapal yang tenggelam tersebut tidak diberikan apa-apa latihan, buku panduan, atau di beri taklimat berkenaan dengan apa-apa tatacara pengendalian piawai dalam keadaan kecemasan. Dalam mesyuarat lembaga yang seterusnya, pengarah minoriti mengulangi keperluan untuk satu siasatan bebas dan lembaga membuat keputusan untuk melihat semula isu tersebut selepas siasatan Jabatan Marin telah menyelesaikan siasatannya dan satu *document of compliance* dikeluarkan yang menunjukan bahawa tiada kecuaian, lembaga membuat keputusan untuk tidak menjalankan siasatan bebas, plaintif kemudiannya membuat keputusan untuk mendapatkan perkhidmatan seorang pakar, En Alan Loynd ('Loynd') untuk memberikan pendapat berkenaan dengan insiden tersebut dan menyimpulkan bahawa insiden tersebut boleh dan patut dielakkan. Defendan pula bergantung kepada laporan bebas yang disediakan oleh M3 Marine Expertise Pte Ltd ('M3 Marine'). Plaintif kemudiannya memajukan beberapa soalan yang dikemukakan oleh pakar kepada lembaga dan memohon agar pakar tersebut diberi akses tidak terhad untuk meneliti bangkai yang mana kosnya akan ditanggung oleh defendan. Defendan akhirnya menolak untuk menuruti permohonan ini dan plaintif mengeluarkan notis statutori di bawah s 348 Akta tersebut, selepas daripada pengeluaran notis statutori tersebut, lembaga memutuskan untuk melantik dua pemeriksa untuk menjalankan siasatan bebas dan memberi mandat kepada pengerusi untuk melantik pemeriksa untuk menjalankan siasatan. Plaintif dan satu lagi pengarah mengundi menentang cadangan tersebut dan mencadangkan dua pakar bebas dilantik untuk menyiasat insiden tersebut, seorang dilantik oleh pengarah majoriti dan satu lagi dilantik oleh pengarah minoriti, namun lembaga membuat keputusan bertentangan dengan cadangan ini.

Diputuskan, mengetepikan permohonan dengan kos:

(1) Larangan di bawah s 41A(1) Akta Timbang Tara 2005 tidak dipanjangkan kepada bukan pihak kepada satu timbangtara. Larangan statutori ini melampaui prinsip *common law* berkaitan dengan kerahsiaan yang berkaitan dengan apa-apa timbang tara. Prinsip common law berasaskan satu tanggungjawab tersirat, sekiranya bukan tersurat antara pihak-pihak kepada satu timbang tara, ianya tidak boleh dikatakan dipanjangkan kepada individu yang tidak merupakan pihak. Kerahsiaan yang dikenakan tidak akan terpakai apabila kepentingan keadilan memerlukan pendedahan (lihat perenggan 40–42).

(2) Sebagai pengarah defendan, plaintif layak sebagai seorang pengadu untuk maksud s 347, sepertimana takrifan s 345(c) Akta tersebut. Oleh itu, plaintif mempunyai locus standi yang diperlukan untuk menguna pakai s 347 Akta tersebut untuk mendapatkan izin di bawah s 348 Akta tersebut (lihat perenggan 107).

(3) Notis statutori yang diperlukan untuk menunjukan niat pemohon untuk memohon izin mahkamah di bawah s 347 Akta tersebut adalah cukup luas untuk melibatkan izin untuk memulakan prosiding terhadap pihak ketiga (lihat perenggan 111–112).

(4) Dalam memutuskan sama ada izin perlu atau tidak diberikan, mahkamah perlu mengambil kira perkara berikut: (a) sama ada plaintif bertindak dengan niat baik; dan (b) sama ada ianya merupakan dalam kepentingan syarikat secara prima facie bahawa izin diberikan (lihat perenggan 113).

(5) Sekiranya tiada kausa tindakan munasabah dan satu yang mempunyai kebolehan untuk kejayaan yang munasabah, boleh ditunjuk atau sekiranya wujud tujuan lain untuk mengehendaki untuk memulakan prosiding, ianya adalah tidak selaras dengan apa yang diperlukan sebagai niat baik dalam memohon untuk memulakan prosiding dalam nama dan bagi pihak syarikat (lihat perenggan 121).

(6) Tiada jawapan diberikan kepada soalan yang dikemukakan oleh Loynd, oleh itu, pendapat Loynd adalah tidak muktamad. Lanjutan itu, semua laporan lain tidak mencadangkan bahawa wujud apa-apa kecuaian bagi pihak Azimuth Ship Management. Mengambil kira perkara diatas, adalah sukar untuk menyimpulkan bahawa plaintif telah menunjukan wujud kausa tindakan yang baik dalam kecuaian terhadap Azimuth Ship Management dan satu yang mempunyai kebarangkalian kejayaan yang munasabah (lihat perenggan 129, 131–132 & 137).

(7) Individu yang membuat permohonan di bawah s 348 dengan tujuan untuk memajukan satu percanggahan atau untuk mewujudkan kontroversi atau untuk mengganggu pengurusan pihak lawan terhadap syarikat akan diambil kira sebagai mengejar tujuan lain yang tidak selaras dengan kepentingan syarikat yang akan bercanggah dengan kerperluan niat baik yang perlu diambil kira di bawah s 348(3)(a) Akta tersebut (lihat perenggan 144).

(8) Dengan latar belakang percanggahan yang jelas antara pengarah minoriti dan majoriti, fakta yang dari sini wujud tiada keterangan kecuaian pada pihak Azimuth Ship Management berserta dengan hujahan undang-undang yang kekal sebagai halangan terhadap apa-apa tuntutan terhadap kecuaian Azimuth Ship Management, adalah sukar untuk membuat kesimpulan yang ketegasan plaintif untuk memulakan tindakan undang-undang terhadap Azimuth Ship Management dilakukan dengan niat baik dan kepercayaan suci bahawa ianya dalam kepentingan defendan, dan bukannya untuk memajukan percanggahan antara pihak-pihak. Dalam keadaan ini, keperluan niat baik pada pihak plaintif tidak dibuktikan (lihat perenggan 146–147).

(9) Ianya tidak dalam kepentingan defendan untuk tindakan dimulakan

bagi pihaknya yang tidak disokong oleh keterangan atau pendapat yang disimpulkan yang wujud kausa tindakan yang munasabah dan satu yang mempunyai kebarangkalian munasabah untuk berjaya. Ini adalah sedemikian atas asas keperluannya hanya prima facie dalam kepentingan defendan (lihat perenggan 151).]

Notes

For cases on application for derivative action, see 3(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 160–161.

For cases on documents, see 1(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2120–2121.

Cases referred to

Abdul Rahim bin Suleiman (suing as the director and minority shareholder of Semangat Motor Sdn Bhd and in the interest of Semangat Motor Sdn Bhd) & Anor v Faridah bt Md Lazim & Ors [2016] 6 MLJ 449; [2017] 1 CLJ 633, CA (refd)

Celcom (M) Bhd v Mohd Shuaib Ishak [2011] 3 MLJ 636, CA (refd)

Dolling-Baker v Merrett and others [1991] 2 All ER 890, CA (refd)

Emmott v Michael Wilson & Partners Ltd [2008] EWCA Civ 184, CA (refd)

Jacob and Toralf Consulting Sdn Bhd & Ors v Siemens Industry Software Gmbh & Co KG & Ors [2013] MLJU 1621; [2014] 1 CLJ 919, HC (refd)

Ong Keng Huat v Fortune Frontier (M) Sdn Bhd & Anor [2015] 11 MLJ 604; [2015] 10 CLJ 599 (refd)

Pang Yong Hock and another v PKS Contracts Services Pte Ltd [2004] 3 SLR 1, CA (refd)

Legislation referred to

Arbitration Act 2005 s 41A, 41A(1), (2), (2)(a), (2)(a)(i), (2)(b), (2)(c)

Companies Act 1965 ss 181A, 181A(3), 181B, 181B(2), (4), (4)(a)

Companies Act 2016 ss 345(c), 347, 347(1), (3), (4)(b), 348, 348(2), (4), (4)(a), 350

Lambert Rasa Ratnam (G Vijay Kumar and Wee Hee with him) (Lee Hishammuddin Allen & Gledhill) for the plaintiff.

David Matthews (Olivia Loh Yuet Ling, Malarvily Perumal and Chow Xing Hui with him) (Gananathan Loh) for the defendant.

Darryl Goon J:

[1] This was an application by the plaintiff made under s 348 of the Companies Act 2016 ('the CA 2016') for leave to initiate proceedings on behalf of the defendant company pursuant to s 347.

THE PARTIES

[2] The plaintiff is a director of the defendant.

[3] The defendant is a local private limited company in the business of owning, leasing, chartering and hiring boats, ships and other vessels.

[4] The defendant is said to be a joint venture between two companies namely:

(a) Azimuth Marine Sdn Bhd (Company No 961825-A) ('Azimuth Marine'); and

(b) Nautical Supreme Sdn Bhd (Company No 989385-H) ('Nautical Supreme').

[5] The current shareholders of the defendant are however:

(a) Azimuth Marine;

(b) Nautical Supreme; and

(c) an individual by the name of Sudhir a/l Jayaram ('Jaya Sudhir').

[6] Azimuth Marine is the majority shareholder of the defendant. It currently holds 700,000 ordinary shares in the defendant representing 70% of the defendant's issued and paid up capital. Azimuth Marine has two shareholders namely:

(a) East India Shipping Corporation Sdn Bhd ('East India Shipping'); and

(b) an individual, Dato' Ahmad Johari bin Tun Abdul Razak ('Dato' Johari').

[7] East India Shipping owns 75% of the shares in Azimuth Marine. The majority shares in East India Shipping are in turn said to be owned by one Dato' Seri Suresh Emmanuel Abishegam ('Captain Suresh') and his family. Both Dato' Johari and Captain Suresh are directors of Azimuth Marine.

[8] Nautical Supreme is a minority shareholder with 200,000 shares in the defendant. This amounts to 20% of the issued and paid up capital of the defendant. The plaintiff, one Dato' Mohd Daud bin Samsuddin ('Dato Samsuddin') and one Dato' Wan Mohamed Yaacob bin Salaidin ('Dato Wan') are the directors of Nautical Supreme. Nautical Supreme is in turn a wholly owned subsidiary of Dwitasik Marine Sdn Bhd.

[9] Jaya Sudhir is also a minority shareholder who currently holds 100,000 shares in the defendant representing 10% of the issued and paid up capital of the defendant.

[10] Initially, the board of directors of the defendant consisted of:

(a) Captain Suresh, Dato Johari, Dato' Abdul Latiff bin Ahmad ('Dato' Latiff') and Hari Dass Ajaib, who are nominees of Azimuth Marine; and

(b) the plaintiff and Dato' Wan who are nominees of Nautical Supreme.

[11] Subsequently, at a board meeting of the defendant on 7 November 2016, Jaya Sudhir was voted in as a director of the defendant.

[12] Captain Suresh is the chief executive director of the defendant.

[13] The board has since become divided along the lines of the opposing shareholders between the majority shareholders of the defendant represented by Captain Suresh, Dato Johari, Dato' Abdul Latiff bin Ahmad ('Dato' Latiff') and Hari Dass Ajaib, the nominees of Azimuth Marine, together with Jaya Sudhir, as the 'Majority Directors' and the minority shareholder represented by the plaintiff and Dato' Wan as the 'Minority Directors'.

BACKGROUND FACTS

[14] On 11 April 2013, the defendant entered into a Harbour Tugs Services Agreement ('HTSA') with a company known as Vale Malaysia Minerals Sdn Bhd ('Vale') for the charter of seven harbour tugboats owned by the defendant.

[15] For the purposes of providing the harbour tug services, the defendant entered into a Baltic and International Maritime Council ('BIMCO') Standard Ship Management Agreement with a company called Azimuth Ship Management Sdn Bhd ('Azimuth Ship Management').

[16] Captain Suresh was said to be the principal shareholder of Azimuth Ship Management controlling 95% of its shares.

[17] On 19 September 2016, at around 12.30pm the NTT Lumut, one of the harbour tugboats chartered to Vale by the defendant sank with its hull resting on the seabed. This was while the vessel was berthed along a jetty at the Material Handling Quay of Vale's Teluk Rubiah Maritime Terminal in Perak.

[18] At all material times, the NTT Lumut was managed by Azimuth Ship Management.

[19] No proceedings were brought by the defendant against Azimuth Ship Management for the incident involving NTT Lumut.

[20] Hence, this application was filed by the plaintiff invoking ss 347 and 348 of the CA 2016 for, inter alia, an order that the plaintiff be given leave to initiate proceedings against Azimuth Ship Management in the name of the defendant.

[21] It was the plaintiff's intention that the action to be brought against Azimuth Ship Management would be grounded in the tort of negligence.

THE DEFENDANT'S PRELIMINARY OBJECTION

[22] At the commencement of this application, learned counsel for the defendant raised an objection to the use of two documents that were annexed to exh 'TSR(AIR) – 4' in the plaintiff's affidavit in reply affirmed on 30 July 2018.

[23] Exhibit 'TSR(AIR) – 4' was a report dated 27th July 2018 by a company called Ferrier Hodgson MH Sdn Bhd ('Ferrier Hodgson'), which was offered as an expert's report. This report was described as a 'Review of the Parker Randall's Assessment and Verification Report on the Financial Impact Suffered by NTT Resulting from the Submerging of NTT Lumut, a 55 TBP (Ton Bollard Pull) tug, on 19 September 2016'.

[24] To this report were Annexures 6 and 9. These were the reports objected to by the defendant and thus the application to expunge them and have them excluded from consideration.

[25] Annexure 6 was a Survey Report of 30 October 2017 by a company called Ritchie & Bisset (Far East) Pte Ltd ('Ritchie & Bisset'), who were consulting Engineers, Marine and Cargo surveyors. Annexure 9 was a report by KPMG Corporate Advisory Sdn Bhd dated 30 October 2017.

[26] The defendant's objection was on the basis that these documents were prepared for the purposes of an arbitration between Nautical Supreme on the one side and Azimuth Marine and the defendant on the other.

[27] The defendant's objection also extended to the report by Ferrier Hodgson MH Sdn Bhd, exh 'TSR(AIR) – 4' itself, insofar as it seeks to rely on or makes references to the documents objected to.

[28] In support of this objection, the defendant relied on s 41A of the

Arbitration Act 2005. Section 41A was only brought into force on 8 May 2018 and was an amendment introduced by the Arbitration (Amendment) (No 2) Act 2018. Section 41A provides as follows:

> 41A Disclosure of information relating to arbitral proceedings and awards prohibited
>
> (1) Unless otherwise agreed by the parties, no party may publish, disclose or communicate any information relating to —
>
> (a) The arbitral proceedings under the arbitration agreement; or
>
> (b) An award made in those arbitral proceedings.
>
> (2) Nothing in subsection (1) shall prevent the publication, disclosure or communication of information referred to in that subsection by a party —
>
> (a) if the publication, disclosure or communication is made —
>
> (i) to protect or pursue a legal right or interest of the party; or
>
> (ii) to enforce or challenge the award referred to in that subsection,
> In legal proceedings before a court or other judicial authority in or outside Malaysia;
>
> (b) if the publication, disclosure or communication is made to any government body, regulatory body, court or tribunal and the party is obliged by law to make the publication, disclosure or communication; or
>
> (c) if the publication, disclosure or communication is made to a professional or any other advise of any of the parties.

[29] Learned counsel for the defendant maintained that no consent was given by the defendant, who was a party to the arbitration, for the publication, disclosure or communication of either of the documents in question. As such, the reference to and use of the documents by Ferrier Hodgson MH Sdn Bhd in its report should not be allowed and should be expunged and/or excluded from this proceeding. The plaintiff himself was however, not a party to the arbitration.

[30] Learned counsel for the defendant referred to the decision of the English Court of Appeal in *Dolling-Baker v Merrett and others* [1991] 2 All ER 890 at p 899 for the common law position, where Parker LJ stated:

> As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award — and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration — save with the

consent of the other party, or pursuant to an order or leave of the court. That qualification is necessary just as it is in the case of the implied obligation of secrecy between banker and customer.

[31] Learned counsel for the defendant contended that the confidentiality extends even to a third party such as the plaintiff who was not a party to the arbitration. Authority for this proposition is found in the decision in *Jacob and Toralf Consulting Sdn Bhd & Ors v Siemens Industry Software Gmbh & Co KG & Ors* [2013] MLJU 1621; [2014] 1 CLJ 919 at p 930, where Her Ladyship SM Komathy Suppiah JC (as Her Ladyship then was) stated:

> [30] I accept the submission of the plaintiffs that the principles set out in *Coco* and *Guardian Newspaper* have no application to arbitration proceedings. In my view, even if the impugned document contains information that is not inherently confidential or information that is already in the public domain, it is still subject to the obligation of privacy and is a document private to the parties to the arbitration and the arbitral tribunal. *The principle of privacy precludes third parties from making use of documents generated in arbitration proceedings outside the arbitration without the consent of the party producing it or the leave of court must be preserved and upheld.* (Emphasis added.)

[32] Learned counsel for the plaintiff submitted however, that the common law approach to confidentiality had evolved to being more lenient. For this proposition, learned counsel pointed to the decision of the English Court of Appeal in *Emmott v Michael Wilson & Partners Ltd* [2008] EWCA Civ 184 at p 215 where Lawrence Collins LJ stated:

> 105. But case law over the last 20 years has established that there is an obligation, implied by law and arising out of the nature of arbitration, on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and not to disclose in any other way what evidence has been given by any witness in the arbitration. The obligation is not limited to commercially confidential information in the traditional sense.
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> 106. As I have said above, this is in reality a substantive rule of arbitration law reached through the device of an implied term. That approach has led to difficulties of formulation and reliance (perhaps, over-reliance) on the banking principles in Tournier.
>
> 107. In my judgment the content of the obligation may depend on the context in which it arises and on the nature of the information or documents at issue. The limits of that obligation are still in the process of development on a case-by-case basis. *On the authorities as they now stand, the principal cases in which disclosure will be permissible are these: the first is where there is consent, express or implied; second, where there is an order, or leave of the court (but that does not mean that the court has a general discretion to lift the obligation of confidentiality); third, where it is reasonably necessary for the protection of the legitimate interests of an arbitrating party; fourth,*

A *where the interests of justice require disclosure, and also (perhaps) where the public interest requires disclosure*. (Emphasis added.)

B **[33]** Since the cases cited by learned counsel, s 41A has been introduced into the Arbitration Act 2005. Section 41A(2)(a)(i) provides an exception to the prohibition set out in s 41A(1). This exception permits the publication, disclosure or communication by a party to an arbitration of such information to pursue a legal right or interest of that party.

C **[34]** Section 41A, and in particular s 41A(2)(a)(i), learned counsel for the plaintiff maintained, was consonant with the evolved principle at common law. Consent is thus no longer the only exception to the confidentiality imposed.

D **[35]** By its opening words, s 41A(2) is in fact drafted in a manner such that the exception is not by way of an *exemption* from the prohibition imposed by s 41A(1) but rather, that the prohibition imposed *does not extend* to the circumstances set out under s 41A(2)(a)–(2)(c).

E **[36]** Thus, any party to an arbitration may publish, disclose or communicate information relating to that arbitration if it is within the circumstances set out under s 41A(2)(a)–(2)(c), without requiring any prior leave to do so.

F **[37]** If a party to the arbitration is eligible to the exception in s 41A(2)(a)(i), a fortiori would this exception not extend to a third party who is not party to the arbitration? After all, the prohibition in s 41A(1) itself, as formulated, is not extended to non-parties to an arbitration.

G **[38]** It would be a strange result if parties to an arbitration who are subject to the prohibition under s 41A(1) may enjoy the exceptions under 41A(2), but third parties not privy to the arbitration (and thus not caught by s 41A(1)) may not and are to remain prohibited either by s 41A(1) or its common law equivalent from using any information in an arbitration, without the benefit of any exception.

H

[39] For the purposes of this case, if the plaintiff was a party to the arbitration, he would have been able to rely on s 41A(2)(a)(i) to maintain that the prohibition in s 41A(1) does not extend to his use of the impugned documents for the purposes of his application in this originating summons.

I

[40] Clearly, the prohibition under s 41A(1) does not extend to non-parties to an arbitration. This statutory prohibition supersedes the common law principles of confidentiality attached to any arbitration. There would be no

point for this formulation if the common law principles were intended to continue to apply.

[41] Furthermore, the common law principle is founded upon an implied, if not otherwise expressed, obligation between the parties to an arbitration. On this basis, it also cannot be said to extend to non-parties to an arbitration.

[42] More importantly, as was disclosed in *Emmott*'s case, the confidentiality imposed would not apply where the interest of justice requires disclosure.

[43] In substance, a similar conclusion was arrived at in *Jacob and Toralf Consulting Sdn Bhd & Ors* where Her Ladyship SM Komathy Suppiah held that:

> If the ends of justice require such documents to be disclosed in court proceedings between the parties or other third parties then the court will be the arbiter of whether or not such disclosure ought to be permitted, provided an application is made to the court for that purpose.

[44] Having regard to the foregoing, the defendant's oral application to expunge or exclude exh 'TSR(AIR) – 4' and Annexures 6 and 9 thereto, found in the plaintiff's affidavit in reply of 30 July 2018 was disallowed.

THE PLAINTIFF'S COMPLAINT

[45] On the 20 September 2016, the board of directors of the defendant was informed by Captain Suresh of the incident involving NTT Lumut the day before.

[46] On the 2 November 2016, at the board of directors' meeting of the defendant, Captain Shashi Harinarayanan ('Captain Shashi'), the Chief Executive Officer of Azimuth Ship Management, briefed the board about the incident relating to NTT Lumut.

[47] At this board meeting Captain Shashi informed the directors that the port side of the NTT Lumut was caught against the fenders at the Material Handling Quay, Teluk Rubiah Maritime Terminal. This, the directors were informed, combined with the weather conditions and high tidal range, caused NTT Lumut to submerge.

[48] To a question posed by the plaintiff, Captain Shashi reported that Vale, the Marine Department and the insurers had undertaken their respective investigations which indicated that the incident was an 'accident'.

[49] It was at this board meeting that the plaintiff proposed that an independent inquiry be undertaken in respect of the incident as Captain Suresh and Azimuth Marine were conflicted and unable to assess and investigate the incident in the best interest of the defendant.

[50] There was no resolution by the board adopting the plaintiff's proposal. The plaintiff informed the board that in accordance with the advice of his lawyers, he will be considering a 'section 181 action' against the defendant and its directors for not wanting to initiate an independent inquiry.

[51] On 18 November 2016, the defendant's board of directors was provided with a report on the incident by Vale. This report by Vale was dated 5 October 2016. The description of the incident given in this report stated as follows:

> Brief Description:
>
> On 19th September 2016 around 1230hrs NTT Lumut that is alongside at MHQ jetty had come stuck with the fender structure at the jetty. The incident were spotted by her on crew. Attempts were made by the crews to remove her from the position but failed.
>
> Subsequently vessel was released from the position by herself due to change of tide. However entanglement between vessel and fender structure had punctured the vessel structure. This cause seawater ingress and sunk the vessel.
>
> Immediate action taken to contain any oil spillage, and emergency response were initiated to control the situation.

[52] Attached to this report were interviews conducted with the crew of NTT Lumut. The captain (Herman Siregar), the Oiler (Amiruddin) and an able bodied seaman (Idang Munawar) were interviewed. The following was a common response given by all:

(a) that there were no company direction/instructions for the scenario that occurred;

(b) that there was no training for an emergency situation such as the scenario that occurred; and

(c) that they were not provided with a manual or SOP in handling any emergency scenario.

The captain said that he was only told 'to call DPA or office Manjung if anything were to happen'.

[53] The plaintiff maintained that from these interviews, it was clear that the crew of NTT Lumut had not been given any training, any manuals or briefed on any standard operating procedures in an emergency.

[54] At the board meeting of 7 December 2016 t he minority directors reiterated the need for an independent investigation into the incident. However, on this occasion, the board resolved to revisit the issue, pending the investigations by the Marine Department and the insurers.

[55] At the board meeting of 8 February 2017, the directors were informed that the Marine Department and the Department of Environment had concluded their investigations but their respective reports have not been released. Again, no decision was made to commission an independent investigation, pending the release of these reports.

[56] At the board meeting of 31 March 2017, Dato Wan again sought to have an independent investigation conducted. This was again opposed, pending the release of the report by the Marine Department. The plaintiff was not present at this meeting.

[57] At the board meeting of 14th November 2017, the board was informed by Captain Suresh that the Marine Department had concluded its investigations and a document of compliance ('DOC') was issued to Azimuth Ship Management indicating that there was no negligence. The board was also informed that the Marine Department's report was not expected to be released but after completing its investigations, the DOC was issued. This, it was said, was sufficient to indicate that there was no negligence on the part of Azimuth Ship Management. The board again resolved not to conduct an independent investigation into the incident.

[58] In the circumstances, the plaintiff decided to engage an expert to provide an opinion on the sinking of NTT Lumut. The expert the plaintiff engaged was one Mr Alan Loynd ('Loynd') of Branscombe Marine Consultant Ltd in Hong Kong. Loynd is a Master Mariner and he was provided with, inter alia, Vale's report, the interviews and specifications of NTT Lumut.

[59] Loynd first submitted a preliminary report to the plaintiff dated 23 November 2017. This was followed by a supplementary report dated 4 December 2017.

[60] In para 34 of the plaintiff's affidavit in support of this application in this originating summons, he deposed to the following in respect of Loynd's preliminary report.

> 34. On 23.11.2017, Mr Loynd submitted his preliminary report on the Incident to me. In Mr Loynd's view, there were serious questions that needed to be answered in regard to the sinking of NTT Lumut and a thorough investigation warranted. … Mr Loynd's preliminary conclusion based on the available material was that there was no evidence any of the measures that should ordinarily have been implemented to

prevent the sinking of a vessel, were implemented in the case of NTT Lumut. The crew of NTT Lumut also did not appear to have been competent to handle an emergency, while the ship managers appeared to have neglected normal best practices, both in training the crew and in responding to the emergency. He was therefore of the view that the sinking of NTT Lumut could and should have been prevented.

[61] In his preliminary report, Loynd in fact made the following statements:

(a) 'I have been engaged to prepare a preliminary report on the possible cause for the sinking of the tug NTT Lumut';

(b) of the documents he was given, Loynd stated, 'In my opinion, these documents are totally inadequate since they do not explain the cause and location of the damage or the exact course of events which led to the loss of the vessel'; and

(c) 'I consider the case warrants thorough investigation by a professional to ascertain the facts. At the moment, I do not have sufficient evidence to fully explain the loss of *NTT Lumut,* but a number of questions should be addressed, ...' Loynd then sets out a list of questions.

[62] Loynd's conclusion in his preliminary report was as follows:

> In conclusion, there is no evidence that any of the normal professional steps to prevent a sinking were implemented in this case. The crew do not appear to have been competent to handle the emergency, and the managers appear to have neglected normal best practice, both in training the crew and in responding to the emergency. *My feeling, based upon the evidence I have seen, is that this casualty could and should have been prevented*. (Emphasis added.)

[63] Loynd's supplementary report was provided in response to a question posed by the solicitors for the plaintiff. The following was what Loynd stated in his supplementary report:

> I have been contacted by Messrs Lee Hishammuddin Allen and Gledhill, as solicitors for Dato' Seri Timor Shah Rafiz, and requested to answer a follow-up question to my initial report. The question is:
>
> > In my considered opinion, *in the absence of a satisfactory answer to the questions posed on pages 3 and 4 of my report dated 23 November 2017*, could the sinking of 'NTT Lumut' have been avoided if any of the measures noted in the said pages had been taken?
>
> My answer is yes, I believe the sinking could have been avoided, for the following reasons ... (Emphasis added.)

Loynd then sets out a list of his reasons why he believes the sinking of NTT Lumut could have been avoided.

[64] The plaintiff was then advised to forward the questions posed by Loynd to the board for answers to be provided. This, the plaintiff's solicitors did on 11 December 2017. The board was given seven days by the plaintiff's solicitors to furnish answers to the questions raised by Loynd and to grant Loynd unrestricted access to inspect the wreckage of NTT Lumut. This was all to be done at the defendant's cost.

[65] The defendant, upon the instructions of Captain Suresh, replied on 21 December 2017 through its solicitors that the plaintiff's request should be considered by the defendant's board of directors and that a meeting will be convened to do so.

[66] On 9 January 2018, an emergency board meeting of the defendant was held to discuss, inter alia, the matters raised in the plaintiff's solicitors' letter of 11 December 2017. At this meeting the board was informed that the insurance proceeds received of USD8m exceeded the value of the NTT Lumut if it were to be repaired and chartered, based on the plaintiff's valuation of USD4.1m. Captain Suresh also pointed out that the Marine Department had completed its investigations and was satisfied enough to issue the DOC. After the board's deliberations, the request for answers to be provided to the questions raised by Loynd and for Loynd to inspect NTT Lumut was refused by the board.

[67] Following this board meeting and the refusal to accede to the demands of the plaintiff's solicitors, the statutory notice under s 348 dated 18 January 2018 was issued by the plaintiff through his solicitors.

[68] In response, another emergency meeting of the board of directors of the defendant was convened via conference call to discuss the statutory notice issued. This meeting took place on 23 January 2018.

[69] The majority directors at this meeting of the 23 January 2018 expressed the view that notwithstanding the board's earlier resolutions, it was now in the best interest of the company to appoint one or two surveyors to conduct an independent investigation into the incident involving NTT Lumut. This was so as to avoid further disruptions, to save substantial legal costs, to save time and as well as not jeopardise the HTSA and a supplementary agreement that had been entered into between the defendant and Vale.

[70] The board then resolved by a majority mandating the chairman, Dato Johari, to appoint surveyors to conduct an independent investigation into the incident involving NTT Lumut with a budget of USD100,000.

[71] The plaintiff and one Syed Feisal Alhady (alternate director to Dato Wan) however, voted against this proposal. The plaintiff instead,

proposed that two independent experts be appointed to investigate the incident, one to be appointed by the majority directors and the other by the minority directors. This was a new proposal by the plaintiff. The board however, resolved against this proposal by the plaintiff.

[72] The plaintiff maintained that this 'sudden about-turn' by the majority directors in agreeing to an investigation was motivated by bad faith, the alleged intention being to stifle his efforts to seek redress on behalf of the defendant. How this could happen was not elaborated.

[73] It needs be mentioned that the minority directors have disputed the accuracy of all the minutes of the board of directors' meetings prepared and exhibited in the affidavits.

[74] It seems quite clear that rather than the board of directors of the defendant refusing to initiate legal action against Azimuth Ship Management, it was its initial refusal to agree to the plaintiff's initial proposal for an independent investigation into the sinking of NTT Lumut that was the subject matter of the plaintiff's complaint.

[75] Upon the board's subsequent agreement on 23 January 2018 to commission an independent investigation, the complaint can only be against the board's refusal to agree to the plaintiff's new proposal ie that separate independent experts be appointed by the defendant, one by the majority directors and one by the minority directors.

[76] In was in light of the foregoing that the plaintiff commenced this originating summons for leave to initiate proceedings against Azimuth Ship Management for its alleged negligence in relation to the sinking of NTT Lumut.

THE DEFENDANT'S OBJECTION TO THE LEAVE SOUGHT

[77] The defendant opposed this application on the grounds, inter alia, that in making this application, the plaintiff was not acting in good faith and the proposed action against Azimuth Ship Management would not be in the best interest of the defendant.

[78] The defendant first maintained that the intended action against Azimuth Ship Management was doomed to fail. The defendant had successfully claimed under its insurance policies in respect of the loss suffered arising from the sinking of NTT Lumut.

[79] The defendant had recovered a sum of USD153,002.18 under a

Protection and Indemnity Policy ('PI Policy') and a sum of RM22,235,591.90 (approximately USD5,200,000) under a Marine Hull Policy ('MH policy'), from its insurers, Allianz General Insurance Company (M) Bhd ('Allianz'). A

[80] RM19,885,591.90 received under the MH policy was paid to the defendant's financier Export-Import Bank of Malaysia Bhd ('Exim Bank') towards settling part of the defendant's loan liabilities. B

[81] By reason of its having been paid by its insurers, the defendant maintained that any right of action it might have against Azimuth Ship Management would have been subrogated to its insurers, Allianz. The defendant thus no longer had any right to pursue Azimuth Ship Management in respect of any negligence that it might be liable for in relation to the sinking of NTT Lumut. C

[82] At the time of the incident, NTT Lumut was in a 'laid-up' state and was not generating charter hire revenue. Although chartered to Vale, NTT Lumut was not actively used. As such, and in a 'laid-up' state, it received only a 'laid-up' rate which was lower than if it was actively used. In the circumstances, Captain Suresh negotiated with Vale, the insurers and Exim to 'close-out' NTT Lumut. D E

[83] The negotiations were successful and on 14 November 2017, the defendant's board of directors unanimously resolved to enter into a supplementary agreement with Vale to cancel the charter of NTT Lumut for a sum of USD3.5m. This sum was to be paid by Vale to the defendant in monthly installments over three years effective from 1 August 2017. Significantly, even t he minority directors approved of this. F

[84] The defendant also maintained that under the BIMCO Standard Ship Management Agreement, Azimuth Ship Management's liability for any negligence was limited to ten times its annual management fee. However, the agreement states that there was no annual management fee. Therefore, upon the defendant's interpretation of the agreement, no monetary recovery can be obtained from Azimuth Ship Management even if it is found negligent. G H

[85] As for Loynd's reports, it was contended that they do not conclude that Azimuth Ship Management was actually negligent or was at fault for the sinking of NTT Lumut. Loynd does not know without completing his investigation. I

[86] Even in his supplementary report, Loynd's opinion was that the sinking of NTT Lumut could have been avoided 'in the absence of a satisfactory answer' to the questions he posed.

[87] On the other hand, the defendant maintained that there was the independent report of M3 Marine Expertise Pte Ltd ('M3 Marine') which was obtained by the board pursuant to its resolution on 23 January 2018.

[88] M3 Marine was instructed by Dato Johari pursuant to the board's resolution. M3 Marine's report dated 23 May 2018 was prepared by one Captain Michael AN Mead.

[89] In the introduction to M3 Marine's report, it was stated of its scope of work as follows:

> 3.1.6 The scope of work as directed by the Client was to inspect the damage at current location of the Tug and comment on any shorfalls in operational and technical management that led to the casualty.

[90] In its conclusion M3 Marine observed of the DOC as follows:

> 6.1.1 The Tug was managed by the Managers, an international Ship Management company and a member of the InterManager.
>
> The Government of Malaysia through the MMD issued the Managers the Document of Compliance (DOC) in accordance with the International Safety Management Code (ISM) on 20th November 2015 with a validity to 19th November 2020. This certification is the documentary evidence that the Safety Management System of the company is in full compliance with the ISM code and that Managers have shown diligence in setting up their management systems and the Safety Management systems on their respective Tugs.
>
> The DOC is subject to annual review and post the Tug's incident, the DOC was renewed on 1st February 2017.
>
> The Managers were in compliance with the ISM code before, during and after the casualty which is high level evidence of a safe, diligent and well-run Company.

The DOC was renewed after the sinking of NTT Lumut.

[91] In this regard, Loynd's observation in relation to DOC issued was quite without basis and unwarranted. In his preliminary report, Loynd observed as follows:

> 6. the company had a valid document of Compliance issued almost one year earlier, but this merely records that the company's safety documentation was in order. It is possible that the authorities did not visit NTT Lumut to determine whether the crew were familiar with the Safety Management System. Had they done so they might have discovered that some crew members claim never to have seen the Emergency Contingency Plan.

The allegation made against the authorities is serious. Although couched as a mere possibility, such a suggestion should not even be raised unless there exists some basis for it. None, however, was provided.

[92] The following were among the conclusions set out in M3 Marine's report: A

> 6.1.3 The reduced man-power on-board the Tug at the time of the incident was in accordance with the SMC as determined and issued by the Marine Department of Malaysia.
>
> 6.1.4 At the time of the incident, during the worsening weather and the foundering of the Tug, the Managers, in consultation with the Terminal Managers, VALE, did their utmost to stop the flooding of the Tug. B
>
> 6.1.5 We are of the opinion that this was undertaken taking into consideration the safety policy of both the Managers and VALE to ensure there was no risk of injury or loss or [sic] life, nor pollution in-line with VALE's global HSE policy of 'Life Matters Most' and 'ZERO harm. The policy is attached in Appendix B. C
>
> 6.1.6 The incident, although unfortunate was caused by a combination of a low 'king' Spring tide with the effects of wind and sea further escalating the damage to the Tug. D
>
> 6.1.7 The sister Tug to the NTT Lumut, the NTT Larut was also moored alongside the same jetty during the incident and did not sustain damage.
>
> 6.1.8 Prima Facie and from documents reviewed the Managers system is robust, is approved by Flag and Class and I witnessed evidence of Risk assessments that it is assumed are in line with the Managers procedures. M3ME did not undertake a review of the Managers SMS as this is Class approved. E
>
> 6.1.9 We understand the MMD investigated the incident and were satisfied with the actions of the Client and the Managers. In investigating and resolving this incident the DOC of the Managers remained in force without sanction.
>
> It is believed that had the MMD found the Managers negligent in the Tugs incident, they would have revoked the DOC from the Managers immediately. F
>
> 6.1.10 M3ME witnessed nothing untoward in the management of the Tug nor the actions or Managers after the incident. In fact, the concern shown by the Client and the Managers to ensure the Safety of their crew and the protection of the environment in their efforts to avoid pollution should be commended. G
>
> 6.1.11 This incident was caused by the Tugs hull being caught underneath the quay fender. It is believed that even though the rubber facing of the fender was worn down and no matter how good a condition the fender was in, the Tug being caught underneath the steel part of the fender was not thought possible given the long period the Tug had been at the jetty, through many tidal cycles, including Spring tides that had lows even lower than the tide at the time of the incident. The pressure of the rising tide against the hull coupled with the added pressure caused by the inclement weather and the steel vertical component of the fender pierced the hull of the Tug. H
>
> In layman's terms, if the quay fender was brand new the incident and the resultant submerging would still have happened. I

[93] From this report, it can be seen that it was not only the crew of NTT Lumut who attended to the emergency. The terminal managers and Vale were

consulted and it was reported that they 'did their utmost to stop the flooding of the Tug'. The crew of NTT Lumut therefore had the benefit of assistance from the terminal managers and Vale.

[94] Based on M3 Marine's investigation, there was no suggestion of any fault on the part of Azimuth Ship Management or the crew either in respect of the cause of NTT Lumut's sinking or the failure to prevent its sinking.

[95] The defendant had also exhibited documentary evidence consisting of check lists obtained from Azimuth Ship Management indicating that the crew were briefed on a variety of issues including safety.

[96] This evidence somewhat contradicts the interviews with the crew disclosed in Vale's report. It must be borne in mind that the crews' responses to the lack of instructions or training were in respect of the specific scenario that NTT Lumut encountered. Even if the answers to the interviews are taken literally, whether the circumstances were such that the crew could in fact have done anything to save the vessel remains a question at large.

[97] There was also a report by Allianz's loss adjusters, Braemar Technical Services Pte Ltd ('Braemar'). A copy of this report was obtained by the defendant. Braemar's report was dated 4 May 2017. Braemar was instructed by Allianz, and its underwriters, to carry out a survey on NTT Lumut, '… for the purpose of ascertaining the cause, nature and extent of damage alleged to have been sustained …'.

[98] As to causation, Braemar concluded as follows in its report:

> CAUSATION
>
> Owners allege that the damage occurred as follows: Quote:
>
> 'NTT LUMUT under heavy weather and swell came fast onto the MHQ fenders and sustained a hull breach. Flooding took place in the steering compartment and subsequently in the E/R. The vessel is currently in her same lay-up position but the entire aft section is submerged in water.
>
> In our opinion the damage found could be reasonably attributed to the alleged cause'.

There was also nothing in this report to suggest that Azimuth Ship Management or the crew of NTT Lumut was in any way at fault for the sinking of NTT Lumut.

[99] Braemar's report also stated that personnel from the Jabatan Laut attended at the scene at 1815 hrs on the day of the incident itself. The measures taken to attend to NTT Lumut were also set out in the report.

[100] As for the allegation that the defendant had suffered substantial loss and damage by reason of the submergence of NTT Lumut, the defendant commissioned a report by a firm by the name of Parker Randall. Parker Randall's report was dated 18 June 2018. Its assignment was described as follows:

> 1.7 The assignment conducted is to verify, validate and make a comparison of the cost benefit to NTT based on IF:-
>
> (a) The vessel is in an operative condition laid-up till the end of the contract period and in this instance the laid-up revenue due receivable being same as is being received by the sister vessel NTT Larut in the Supplementary Agreement to the HTSA signed on 10th October 2017 with Vale Malaysia.
>
> (b) The vessel is in an operative condition laid-up until the year 2016 of the contract period and back on charter with the revenue receivable as provided for in the HTSA signed on 11th April 2013 with Vale Malaysia.
>
> (c) In comparison to the current state of the vessel which is to be sold as scrap with no laid-up income generated but with the proceeds from the insurance claim and compensation from Vale Malaysia and sale of the vessel as scrap.
>
> (d) The assignment is to present the Net Present Vallue ('NPV') of the three scenarios as described above.

[101] Parker Randall, in its report, concluded as follows:

> 14. Conclusion
>
> 14.1 Based on the above methodology applied, it is in our opinion that the Vessel NTT Lumut's net present value gain is higher in the form of the disposal gain, in comparison to the Net income Approach of both revenue streams laid up and on full charter.
>
> 14.2 Going further, based on the three (3) different scenarios obtained by using three (3) different Present Values, it is evident that Scenario I of the forecast analysis, which is the net income derived from Insurance proceeds and compensation by Vale MINERALS is higher when compared with Scenario 2 and 3, whereby the tugboat receives the net income until the end of the contract in 2030.

[102] It was in response to Parker Randall's report that the plaintiff sought the views of Ferrier Hodgson which resulted in the latter's report of 27 July 2018. In its review of Parker Randall's report, Ferrier Hodgson concluded as follows:

> 76. In view of the above, it appears that the Parker Randall Report is *insufficient and inconclusive* to substantiate the Defendant's contention that there was no financial loss suffered by NTT arising from the Mishap.
>
> 77. In addition, as per the RB Valuation Report, the market value of NTT Larut (which is the same specification and identical to NTT Lumut) inclusive the HTSA as at 30th October 2017 will be in the region of USD10,000,00.00.

78. It is clear that the MH Payout, the Close-Out Payout and the disposal of NTT Lumut as scrap which amounting to approximately USD8,800,000 is lower than the market value of USD10,000,000 as assessed by RB as at 30 October 2017, *which suggests that there is a financial loss suffered by NTT arising from the Mishap of approximately USD1,200,000.*

79. Taking into consideration of the economic value that could be extracted from NTT Lumut under the HTSA and the RB Valuation Report, it is also clear that the full potential economic value that could be extracted from NTT Lumut by NTT during her entire useful life of 30 years is far higher than the MH Payout, the Close-Out Payout and the disposal of NTT Lumut as scrap. (Emphasis added.)

As emphasised above, Ferrier Hodgson did not go so far as to maintain that Paker Randall was wrong in its conclusion. The defendant's remaining financial loss suggested by Ferrier Hodgson in its report was USD1,200,000.

[103] Based on the survey report by Ritchie & Bisset of 30 October 2017, the present-day value of NTT Lumut was USD5.7m. Whereas, based on Ferrier Hodgson's earlier report of 24 October 2017, commissioned by the plaintiff, the value of NTT Larut was given as being only USD4.1m.

[104] Captain Suresh maintained that this issue pertaining to NTT Lumut was part of a conspiracy against him and this application by the plaintiff should be viewed in the light of the proceedings brought by the defendant against the plaintiff and others in KL High Court Suit No WA-22NCC-163–05 of 2017.

APPLICATION FOR LEAVE UNDER SECTION 348

[105] Section 347 of the CA 2016 states as follows:

347 Derivative proceedings

(1) A complainant may, with leave of the Court initiate, intervene in or defend a proceeding on behalf of a company.

(2) Proceedings brought under this section shall be brought in the company's name.

(3) The right of any person to bring, intervene in, defend or discontinue any proceedings on behalf of a company at common law is abrogated.

[106] Section 348 of the CA 2016 states as follows:

348 Leave of Court

(1) An application for leave of the Court under section 347 shall be made to the court without the need for an appearance to be entered.

(2) The complainant shall give thirty days' notice in writing to the directors of his intention to apply for the leave of Court under section 347.

(3) Where leave has been granted for an application under section 347, the complainant shall initiate proceedings in Court within thirty days from the grant of leave.

(4) In deciding whether or not leave shall be granted, the Court shall take into account whether —

(a) the complainant is acting in good faith; and

(b) it appears prima facie to be in the best interest of the company that the application for leave be granted.

(5) Any proceedings brought, intervened in or defended under this section shall not be discontinued, compromised or settled except with the leave of the Court.

[107] Being a director of the defendant, the plaintiff qualifies as a 'complainant' for the purposes of s 347 of the CA 2016, as defined under s 345(c). Accordingly, the plaintiff has the requisite locus standi to invoke s 347 and to apply for leave under s 348.

[108] As for the statutory notice given under s 348(2) of the CA 2016, the defendant maintained that the complaint was not of the defendant's refusal to commence proceedings against Azimuth Ship Management.

[109] It was contended that the complaint set out in the statutory notice was about the defendant's board of directors' refusal to accede to the plaintiff's solicitors' demand that: (a) the questions posed by Loynd in the third and fourth pages of his preliminary report of 23 November 2017 be answered; and (b) that Loynd be granted unrestricted access to inspect NTT Lumut in order to provide a report on his findings.

[110] While it is clear that an application under s 347(1) is for leave to 'initiate, intervene in or defend a proceeding on behalf of the company', s 348(2), however, does not impose any formal requirement for the statutory notice.

[111] The notice that is required is simply of the complainant's intention, 'to apply for the leave of Court under section 347'. This, in the court's view, was duly complied with by the plaintiff's notice of 18 January 2018, issued by his solicitors. A similar conclusion was arrived at by the Court of Appeal in *Abdul Rahim bin Suleiman (suing as the director and minority shareholder of Semangat Motor Sdn Bhd and in the interest of Semangat Motor Sdn Bhd) & Anor v Faridah bt Md Lazim & Ors* [2016] 6 MLJ 449; [2017] 1 CLJ 633 in relation to s 181B(2) of the Companies Act 1965 ('the CA 1965') which is in pari materia with s 348(2) of the CA 2016. Whether there are reasons or justification for the

leave sought is another matter and one that the court will have to determine in the application for leave itself.

[112] Section 347 is also wide enough to encompass leave to commence proceedings against third parties such as Azimuth Ship Management and it was not contended otherwise by the defendant. Section 347(3) of the CA 2016 expressly abrogated the common law. Therefore, any limitations that may exist at common law that might preclude the grant of leave no longer applies.

[113] In deciding whether or not leave is to be granted to the plaintiff to commence proceedings against Azimuth Ship Management, the court is required to take into account (a) whether the plaintiff is acting in good faith and (b) whether it appears prima facie to be in the best interest of the company that leave be granted. This is a requirement under s 348(4) of the CA 2016.

[114] Although the factors of 'good faith' and the 'best interest of the company' are not expressed specifically to be conditions precedent before leave may be granted, obviously, the court will not be disposed to granting leave if either of these factors were not established. What is contemplated is fundamentally in the nature of a derivative action with the interest of the company in mind.

[115] Suffice to say, as was pointed out by the Court of Appeal in *Celcom (M) Bhd v Mohd Shuaib Ishak* [2011] 3 MLJ 636 at p 646, an application for leave under the former s 181B of the CA 1965, and thus equally an application under s 348 of the CA 2016, is not to be dealt with lightly and be considered with a low threshold similar to leave applications for judicial review.

'GOOD FAITH'

[116] 'Good faith' simpliciter is meaningless if it were not attached to some context. As it is a factor to be taken into account in relation to an application for leave under s 348, 'good faith' must therefore relate to the reason s 347 is invoked.

[117] Thus, 'good faith' under s 348(4)(a) must be read in relation to the purpose of the application for leave whether it be to initiate, intervene in or defend a proceeding in the name and on behalf of a company. If so, and in context, it becomes quite clear that an applicant seeking leave must do so in 'good faith' for those purposes.

[118] The predecessors to ss 347 and 348 were ss 181A and s 181B of the CA 1965. These provisions are materially the same save for one major difference ie under s 181A(3), the common law was not abrogated whereas now, as

indicated above, under s 347(3) of the CA 2016, the common law is expressly abrogated.

[119] Section 181B(4) of the CA 1965 corresponds with section 348(4) of the CA 2016. In considering 'good faith' under s 181B(4)(a) of the CA 1965, the Court of Appeal in *Celcom (Malaysia) Bhd* at p 647 held that:

> [15] The *second crucial requirement* for the determination of the court in granting leave is the need for the respondent *to show that he is acting in good faith in making this application* (s 181B(4)(a)). *The onus of proof here is on the respondent on a balance of probabilities. The test of good faith is two-fold. One is an honest belief on the part of the respondent, and two, that this application is not brought up for a collateral purpose*. (Emphasis added.)

[120] In *Celcom (Malaysia) Bhd,* at p 649, Abdull Hamid Embong JCA, in delivering the judgment of the Court of Appeal, went on to add:

> [16] This second requirement will depend on the factual circumstance which comes before the court. This was stated by Palmer J in *Swansson* with these words:
>
> > Nevertheless, in my opinion, there are at least two interrelated factors to which the courts will always have regard in *determining whether the good faith requirement of s 237(2)(b) is satisfied. The first is whether the applicant honestly believes that a good cause of action exists and has a reasonable prospect of success. Clearly, whether the applicant honestly holds this belief would not simply be a matter of bald assertion: the applicant may be disbelieved if no reasonable person in the circumstances could hold that belief. The second factor is whether the applicant is seeking to bring the derivative suit for such a collateral purpose as would amount to an abuse of process*. (Emphasis added.)

See also *Ong Keng Huat v Fortune Frontier (M) Sdn Bhd & Anor* [2015] 11 MLJ 604; [2015] 10 CLJ 599.

[121] Therefore, if no reasonable cause of action, and one that has a reasonable prospect of success, can be demonstrated or if there is a collateral purpose for wanting to initiate proceedings, such would be incompatible with the required good faith in seeking to initiate proceedings in the name and on behalf of the company. There is no good reason why the ratio of the Court of Appeal's interpretation of s 181B(4)(a) of the CA 1965 in *Celcom (Malaysia) Bhd* should not or may not apply equally to s 348(4)(a) of the CA 2016.

[122] Bearing the foregoing considerations in mind, it needs first to be considered whether, objectively assessed, there exists a good cause of action in negligence against Azimuth Ship Management and one that has a reasonable prospect of success.

A **[123]** In relation to the plaintiff's application, it was in essence predicated on his inability to convince the board to obtain an independent investigation into the incident involving NTT Lumut to the plaintiff's satisfaction. The reason for the board's refusal was attributed to an allegation that the majority directors were heavily conflicted, particularly Captain Suresh.

B

[124] Leaving aside for a moment the reason given for the board's refusal to commission an independent investigation, the fact remains that until to date, there is no independent investigation that satisfies the plaintiff. This is notwithstanding the report that the defendant's Board commissioned M3 Marine to produce after changing its position following the statutory notice issued by the plaintiff under s 348 of the CA 2016.

C

[125] On his part, what the plaintiff has are Loynd's preliminary and supplementary reports. In his preliminary report, Loynd himself stated of the documents given for his consideration that, 'In my opinion these documents are totally inadequate since they do not explain the cause and location of damage or the exact course of events which led to the loss of the vessel'.

D

E **[126]** Loynd then goes on to state in his own words, that 'At the moment, I do not have sufficient evidence to fully explain the loss of NTT Lumut, but a number of questions should be address, as follows: ...'.

F **[127]** However, and curiously, notwithstanding his foregoing statements, Loynd nevertheless concluded in his preliminary report that, 'My feeling based upon the evidence I have seen, is that this casualty could and should have been prevented'.

G **[128]** In his supplementary report Loynd gave what was in essence a conditional answer to the question posed by the solicitors for the plaintiff. Read together with the question posed to him, Loynd's opinion was that, 'in the absence of a satisfactory answer to the questions' he posed in his preliminary report, he believes that the sinking of NTT Lumut could have been avoided and he proceeded to give reasons therefor.

H

[129] No answers were however given to the questions Loynd posed. Therefore, whether the answers would satisfy Loynd or not does not arise. This also means that what Loynd's final opinion may be, remains at large.

I

[130] M3 Marine's report was subsequently disclosed to Loynd. Loynd was instructed to and he provided his views as to why he thought certain of the findings and observations were not sustainable. However, it must be borne in

mind that the base material for Loynd's conclusion were still only those given to him for his preliminary report, without his having the benefit of a full investigation of his own.

[131] In fact, among the various orders sought by the plaintiff in its originating summons (encl 1), were, if leave be granted:

> (d) an order that the Defendant give Mr Alan Loynd, a marine, specialist and/or his servants or agents unrestricted access to inspect the wreckage of NTT Lumut to enable him to complete his investigation and to deliver his final report on the sinking of NTT Lumut;
>
> (e) an order that the Defendant furnish all necessary information and render all necessary assistance required by Mr Alan Loynd and/or his servants or agents to enable him to complete his investigation and deliver his final report on the sinking of NTT Lumut;

Clearly therefore, Loynd's opinion was not final and until it is, it cannot be said that it was his opinion a good cause of action in negligence exists against Azimuth Ship Management and one that has a reasonable prospect of success.

[132] Against Loynd's reports, and what are essentially his preliminary views, were Vale's report, Braemar's report and M3 Marine's report. These reports did not suggest that there was any negligence on the part of Azimuth Ship Management. Whatever may be the criticisms levelled against these reports, they cannot nevertheless be said to be supportive of any conclusion that a good cause of action exists against Azimuth Ship Management and one with a reasonable prospect of success.

[133] In addition, and rather significantly, the defendant has been indemnified by its insurer's, Allianz, under the defendant's PI policy and MH policy. Thus, the defendant has received compensation for its loss.

[134] The plaintiff however maintained that the compensation received was not sufficient to cover the entire loss and damage suffered by the defendant. Again, the experts were not in agreement on this issue.

[135] It was in relation to Allianz having indemnified the defendant that the issue of subrogation was raised by the defendant. Learned counsel for the plaintiff contended otherwise. It was argued that the principle of subrogation raised by the defendant was wrong in law.

[136] Quite apart from the issue of subrogation, learned counsel for the plaintiff also maintained that the defendant's contention, based on the terms of the BIMCO Standard Ship Management Agreement that Azimuth Ship Management would not be liable to pay any damages even if found liable, was

'without basis'. It was argued for the plaintiff that there was ambiguity in the provision relied on by the defendant and, given a 'commercially sensible interpretation', Azimuth Ship Management would not be exempt from paying any compensation if found liable in negligence.

[137] In light of the foregoing and the contrary contentions, it is difficult to conclude that the plaintiff has demonstrated that there exists a good cause of action in negligence against Azimuth Ship Management and one with a reasonable prospect of success.

[138] It is logical that at the stage of an application for leave under s 348, the court is not expected to make any determination as to which expert is correct. What is expected of the court is to consider whether there exists a good cause of action and whether there is any prospect of success. In this case, Loynd has not even completed his investigations. Whether or not his final opinion would be supportive of a good cause of action in negligence against Azimuth Ship Management remains to be seen.

[139] Despite the weight of evidence suggesting that there was no negligence, including those of M3 Marine after a full investigation versus what was only a preliminary view by Loynd that the sinking of NTT Lumut could have been prevented, the plaintiff was still nevertheless adamant in wanting to initiate legal action against Azimuth Ship Management.

[140] The fact that an application has to be made invoking s 348 is itself indicative that there exists disagreement between the opposing factions. The fact that there is disagreement would not per se be indicative of any collateral purpose or bad faith (see *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR 1).

[141] Obviously, disagreements as to whether an action should be brought by a company and whether it would be in its interest to do so would, foreseeably, precede most if not all applications invoking s 348.

[142] However, disagreements would give rise to concern if there exist significant disputes between the parties which do not concern the interests of the company but those of the disputants themselves. In such a situation, the court should be alert to the possibility that there might exist a collateral purpose for the application for leave.

[143] Such a collateral purpose need not have to be elaborate. It is in this regard that the context in which good faith should exist must be borne in mind.

[144] An individual making an application under s 348 with an underlying purpose of furthering a dispute or to create controversy or to disrupt an opposing party's management of the company would be regarded as pursuing a collateral purpose not compatible with the interest of the company. Such a collateral purpose would be contrary to the 'good faith' required to be taken into account under s 348(4)(a) of the CA 2016.

[145] In this case it was quite clear that the opposing factions, t he minority directors and the majority directors, have disputes that are now the subject matter of ongoing litigation. Various allegations have been made, including, accusations of conspiracy against the plaintiff. There was also evidence of committal proceedings brought by the plaintiff against the defendant and its directors. Such disputes of apparent gravity can impair one's judgment (see generally *Pang Yong Hock and another v PKS Contracts Services Pte Ltd* [2004] 3 SLR 1).

[146] Set against the backdrop of the obvious dispute between the minority directors and the majority directors, the fact that hitherto there exists no evidence of negligence on the part of Azimuth Ship Management coupled with the legal arguments that remain as possible impediments to any claim against Azimuth Ship Management in negligence, it was difficult to conclude that the plaintiff's insistence in commencing legal action against Azimuth Ship Management was in good faith and in the honest belief that it was in the interest of the defendant, rather than in furtherance of the dispute between the parties.

[147] In the circumstances of this case, it was the court's view that the required good faith on the part of the plaintiff was not established.

PRIMA FACIE IN THE BEST INTEREST OF THE DEFENDANT

[148] Section 347(4)(b) requires the court to take into account whether it 'appears prima facie' to be 'in the best interest of the company' that leave be granted.

[149] It is significant to note that the statutory standard imposed under s 347(4)(b) is, 'the best interest of the company'. It is a stricter formulation than those found in Canada or Singapore (see *Ong Keng Huat*'s case para 66). It is a higher standard than merely being 'in the interest of the company'. However, the stringency of the standard imposed is mitigated by the requirement that the 'best interest of the company' is to be assessed only upon the basis of it appearing prima facie to be so.

[150] In the circumstances of this case, the factors referred to and considered in relation to the issue of 'good faith', are also relevant in considering whether prima facie, the plaintiff's proposed action would be in the best interest of the defendant.

[151] Clearly, it would not be in the best interest of the defendant for an action to be initiated on its behalf that is not supported by any evidence or concluded opinion that there exists a reasonable cause of action and one that has a reasonable prospect of success. This is so even on the basis of the requirement being only prima facie in the best interest of the defendant.

[152] No consideration appears to have been given as to how much the proposed action by the defendant would cost in terms of professional fees including the cost of an expert's opinion and fee for attendance in court as a witness, not to mention the cost of an appeal against the decision of the court at first instance that may follow. It has not been demonstrated that from a cost benefit perspective, even if there exists a reasonable cause of action, whether such an action would be worthwhile for the defendant to pursue, bearing in mind the insurance monies received and the close-out supplementary agreement with Vale in respect of NTT Lumut. The proposed action, even if successful, may be a Pyrrhic victory for the defendant.

[153] Vale, by reason of the HTSA, is a significant client of the defendant. If the proposed suit against Azimuth Ship Management were to be pursued, Vale may well be required to provide evidence. Its report on the incident being relatively contemporaneous would no doubt be relevant and the plaintiff would probably seek to rely on it, bearing in mind Loynd having done so for his reports.

[154] However, Vale has expressed its views on the matter. In its letter to the defendant of 13 February 2018, Vale stated as follows:

> 1. ...
>
> 2. We note your request for Vale's permission to disclose Vale's reports and documents to an independent surveyor for the purpose of investigating the September 2016 incident involving the NTT Lumut. At this time, I regret to inform you that Vale cannot accede to your request.
>
> 4. *Vale considers this incident to have been brought to an end and we reached agreement regarding the removal of the NTT Lumut from the Harbour Tugs Services Agreement 11 April 2013 ('HTSA'). This resol ution a nd the fact that it has been more than a year since the incident should bring this matter to a close*. If that is not the case, Vale would ask to be informed of the matter being pursued and why we are now being asked to consent to third party disclosures.
>
> 5. *We are aware of a number of disputes involving shareholders and/or officers of NTT. We wish to stress that Vale makes no comment on the merits of an y parties' ca se and*

would wis h to be impartial in any dispute. We do not wish to be drawn into those matters.

6. *We take this opportunity also to remind NTT of its obligations under the HTSA, in particular clause 26 and the obligation on NTT to safeguard confidentiality*. It any confidential information has been disclosed without our consent to any third parties in circumstances not permitted by the HTSA, we request NTT to confirm that such information will not be used or further disclosed and will be returned or destroyed. We request NTT seek similar undertakings from any third parties in receipt of confidential information other than as permitted by the HTSA. We reserve our rights in this regard.

7. I hope my explanation above clarifies Vale's stand.

Yours faithfully

For VALE MALAYSIA MINERALS SDN BHD (863428-M)

-Sgd-

Tim Jackson

Head of Legal & Compliance,

Asia Pacific & Middle East. (Emphasis added.)

[155] This letter was to the defendant marked to the attention of Captain Suresh as its chief executive officer. The plaintiff however, in his capacity as a director of the defendant, wrote a letter dated 20 March 2018 in response to Vale's letter. The plaintiff expressed regret for the inconvenience caused to Vale and proceeded to provide Vale with an explanation of the issues the plaintiff saw as relevant with reference to his attempts to secure an independent investigation, the need to disclose Vale's report in this proceeding and the defendant's shareholders' dispute. This letter of the plaintiff drew no reply from Vale.

[156] Bearing in mind the foregoing, if the proposed legal action is brought this may well jeopardise Vale's relationship with the defendant. Objectively, it is not likely to be Vale's preference to have to do business with a company that is steep in internal disputes to the extent of there being legal actions filed and Vale's personnel being required to testify. If the proposed action is brought against Azimuth Ship Management, it is difficult to see how Vale can be kept from getting involved.

[157] Although this factor per se may not be determinant, it is nevertheless a relevant factor to be considered. This is particularly so in light of the fact that whether there exists a good cause of action against Azimuth Ship Management has not even been established, not to mention the other impediments referred to by the defendant.

[158] Indeed, there was also no evidence that the defendant was under any financial pressure to warrant it embarking on a legal suit. Again, this is particularly so in the circumstances of this case where the proposed suit is one without a concluded view as to any negligence. Such an action would only exacerbate and compound the differences between the main shareholders of the defendant, which was intended to be a joint venture. The shareholders dispute should be resolved in some other way. Causing this proposed action to be filed may be in the interest of one of the disputants but that would not necessarily be in the best interest of the defendant.

[159] In the court's view, and in the circumstances of this case, it has not been established that prima facie, the proposed suit against Azimuth Ship Management would be in the best interest of the defendant.

OTHER CONSIDERATIONS

[160] There was in fact no decision by the board not to pursue any legal action against Azimuth Ship Management. Matters never got to the stage for the proposal to be debated by the board and a decision to be made. It is after all, the board of directors of a company that is prima facie in the best position to determine what is in the best interest of the company and duty bound to act towards that end.

[161] The plaintiff had been and, having regard to the orders sought by the plaintiff referred to above, is still trying to have Loynd complete his investigation into the incident and to deliver his final report.

[162] If the objective of this application was to compel the defendant to facilitate Loynd's investigation, then ss 347–348 of the CA 2016 cannot be used to serve that purpose. In this regard, the powers of the court under s 350 are powers ancillary to and to facilitate the purpose for which leave is granted and that purpose under s 347 must be to initiate, intervene in or defend a proceeding on behalf of the company.

[163] In the circumstances of this case, the plaintiff was somewhat premature in seeking leave under s 348 when he has neither proposed commencing legal action against Azimuth Ship Management to the board of directors nor secured evidence supportive of a good cause of action. Yet, despite this, the plaintiff remained adamant in wanting to commence the proposed legal action against Azimuth Ship Management.

[164] In this regard it cannot be assumed that if the option of suing Azimuth Ship Management is proposed to the board, Captain Suresh will not abstain from voting for reasons of his interest in Azimuth Ship Management. It also

cannot be assumed that the other directors will not maintain fidelity to their fiduciary duty and decide on any such action proposed in the best interest of the defendant.

CONCLUSION

[165] Having regard to the foregoing and for the reasons given, the plaintiff's application was dismissed with costs.

Application dismissed with costs.

Reported by Izzat Fauzan